No. 93-44

29

In The Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
DEC 21 1993
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TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

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REPLY BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

Appellees' briefs all but ignore the First Amendment claims of the cable programmers. From the cable *programmers*' perspective, the constitutional vice of the must carry provisions [1] is that they guarantee a governmentally-favored class of speakers—local broadcasters—access to television audiences through means which necessarily restrict the ability of cable programmers to reach the same audiences. In short, the statute seeks to enhance the voice of certain speakers by burdening the speech of other, less-favored speakers. While the government and the broadcaster beneficiaries of the must carry provisions argue at great length that the allegedly "bottleneck" characteristics of the cable medium justify governmental regulation of the content of the programming cable operators offer their subscribers, they make little effort to explain why a federal edict guaranteeing even the least-viewed local broadcasters access to the alleged "bottleneck" facilities *ahead* of all other video programmers is consistent with the commands of the First Amendment.[2]

1. Appellees fail to rebut appellants' demonstration that Congress has in fact granted these special privileges to broadcasters at the expense of other video programmers because of the types of *programming* broadcasters offer—indeed, are *required* to offer by law.[3] In recognition of

[1] *See* Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, §§ 4 and 5 (47 U.S.C. §§ 534 and 535).

[2] Indeed, access to cable systems is much more crucial to cable programmers than broadcasters. Broadcasters are granted free access to the airwaves, and for decades the public has received broadcast programming over-the-air in the absence of cable systems. And today, despite the ubiquitous availability of cable television, 40 percent of Americans still choose not to subscribe. Cable programmers, by contrast, generally cannot reach television audiences at all if not carried on a local cable system. *See* Turner Br. 4.

[3] *See* Turner Br. 23-28. As appellees Consumer Federation of America, *et al.* ("CFA"), point out, "the objective promoted by

the speech-specific nature of the must carry requirements and content-based justifications offered for them, the government urges the Court to extend the "*Red Lion* standard" [4] to cable television, which, the government asserts, "does not require content-neutrality" but only "viewpoint-neutrality." [5] The broadcasters are less willing to embrace an extension of *Red Lion* (NAB, for example, does not even cite *Red Lion*), but argue instead that the must carry requirements are aimed at preventing "anticompetitive conduct" and therefore, purportedly, are subject only to "rational basis" review. Remarkably, while the broadcasters assert that the exclusive test for determining "content-neutrality" is whether a statute's "purposes" or "justifications" are related to the content of expression, they at the same time urge the Court simply to *ignore* the numerous content-based justifications Congress has expressly offered for Sections 4 and 5. The broadcasters' incongruous assertions notwithstanding, these provisions are "content-based under controlling precedent." J.S. App. 54a (Williams, J., dissenting). *See* Point I, *infra*.

2. The government's bold request that the Court extend the *Red Lion* doctrine to cable television should be flatly—and forcefully—rejected. The melange of economic, technological, and regulatory factors the government relies upon in urging this result—factors that vary

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must-carry is not access for *all* unaffiliated programmers, but access for free local commercial and non-commercial TV stations, precisely because they serve as fiduciaries of the public and are likely to provide service that is different from other unlicensed programmers not subject to the legal obligations of broadcasters." CFA Br. 37-38 n.36 (emphasis in original). *See also* Public Broadcasters ("PBS") Br. 9 ("Because of 'the importance of local programming,' Congress saw 'a need to continue the existing "must carry" rules . . . .'") (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984)).

[4] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[5] Govt. Br. 13. As the majority below acknowledged, "a law need not be viewpoint-based to be . . . considered content-based and subjected to strict scrutiny" (J.S. App. 16a).

among cable systems and geographic areas and which have changed, and will change further, with time—bears no relationship to the physical scarcity of the electromagnetic spectrum which has been held to permit certain governmental intrusions in broadcasting considered intolerable elsewhere. A holding that the government may engage in content-oriented regulation of speech whenever it deems "First Amendment interests" to be "threatened by market dysfunction" (Govt. Br. 14) would have momentous implications, and would place First Amendment *rights* in grave peril.[6] *See* Point II, *infra*.

3. *Even if* the Court were to decide that content-oriented regulation of cable programming is permissible under some "reduced" First Amendment standard, or were otherwise to conclude that mandatory access to cable systems might be permissible in some circumstances, the naked preference for the speech of licensed broadcasters over the speech of all other video programmers embodied in the must carry provisions would still fail to survive review. While there may be, as an abstract matter, governmental interests in "preserving" broadcast television, Congress may not legitimately promote the speech—or fortunes—of broadcasters by mandating that they have preferred access to television viewers at the expense of other First Amendment speakers.[7] Moreover, contrary to the government's assertions (Govt. Br. 2), Sections 4 and

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[6] *See* J.S. App. 67a-71a (Williams, J., dissenting) ("Use of the broadcast standards would be completely inappropriate.").

[7] *Banning* cable program networks would surely "further" the government's interest in "preserving" free broadcast television, but no one suggests that would be permissible. As appellants have already demonstrated, "local broadcasting" is thriving, and the public has access to a greater number of local broadcast stations today than ever before (both over-the-air *and* on cable systems). Turner Br. 39-41. But "even if local broadcasters were in perceptible peril, it would not follow that Congress could secure their survival by must-carry provisions." J.S. App. 66a (Williams J., dissenting).

5 are "specifically aimed" at promoting the interests of broadcasters—not television viewers. Like the rules struck down in *Quincy*,[8] the must carry provisions require carriage of all local broadcasters until the must carry quotas are filled—including the *least*-viewed broadcast stations—regardless of whether the operation of the provisions actually *thwarts* viewer interests and preferences by displacing programming cable subscribers would prefer to receive. *See* Point III, *infra*.

4. To the extent appellees offer arguments that purport to be unrelated to the nature of the programming broadcasters offer, these arguments all are premised on the assertion that decisions by cable operators to carry cable program networks instead of particular broadcasters can uniformly be characterized as "anticompetitive conduct" and enjoined in advance through sweeping prophylactic measures. As set forth in our initial brief (at 42-46) and further below, this assertion cannot withstand even minimal scrutiny.

The principal "economic" justification for must carry the broadcasters have concocted—and which the sponsors of the 1992 Cable Act obligingly incorporated in the legislative "findings"—is that cable operators have economic "incentives" to drop local broadcasters because cable operators and local broadcasters compete for advertising revenues. *See* 1992 Cable Act § 2(a)(15). Yet it is undisputed that cable operators voluntarily carry *most* local broadcast stations, including their *strongest* competitors for local advertising, even though operators could choose to carry additional cable program networks instead. Thus, operators' decisions not to carry *particular* broadcasters must be based principally on other factors—*i.e.*, the desire to attract and retain subscribers by offering an appealing package of programming.[9] Nonetheless, the

[8] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[9] Indeed, in enacting Section 6 of the 1992 Cable Act (the "retransmission consent" provision), Congress recognized—accurately

Act treats every decision by cable operators to carry CNN, Black Entertainment Television, C-SPAN, or The Family Channel in lieu of particular broadcast stations as "anticompetitive conduct" without any showing that particular programming decisions are *in fact* based on "anticompetitive"—rather than entirely legitimate editorial—factors. This approach is so patently overbroad as a response to purported "anticompetitive" behavior, and so remarkably insensitive to First Amendment concerns, as to be unsustainable under any level of First Amendment scrutiny. *See* Point IV, *infra*.

In short, this case does not necessarily require the Court to issue any sweeping proclamations regarding the First Amendment "status" of cable television or to attempt to articulate a "one-size-fits-all" standard for regulation of the cable television industry. It is enough for *this* case that "[c]able television . . . is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991).

ARGUMENT

I. THE MUST CARRY PROVISIONS ARE CONTENT-BASED

It is undisputed that the must carry provisions do nothing other than dictate the content of the programming cable systems must offer their subscribers.[10] Further, as appellants already have demonstrated, the congressional findings and the legislative record make it abundantly clear that Congress has mandated that cable systems carry the programming of local commercial and noncommercial broadcasters—to the exclusion of other sources of video programming to the extent necessary—because of

—that cable operators not only would *voluntarily* carry broadcast stations that cable subscribers desire to receive, but would *pay* broadcasters for the privilege. 47 U.S.C. § 325(b).

[10] *See* CFA Br. 28 (acknowledging that "the direct effect of must-carry" is "to change what the cable subscriber sees").

its assessment of the "importance" of the types of programming broadcasters offer.[11] Thus, even under the test urged by appellees—that a regulation (even one that directly regulates the content of fully-protected speech) is "content-neutral" so long as it is *justified* "without reference" to the content of expression—the must carry provisions fail to escape strict scrutiny.[12]

Moreover, NAB's cynical suggestion that Congress could simply "excise" its actual, content-based justifications for Sections 4 and 5 and re-enact a constitutional statute (*see* NAB Br. 25) would not cure the numerous content-based features of the must carry provisions themselves. *First*, as Judge Williams noted below, Sections 4 and 5 *automatically* incorporate content requirements applicable to broadcast stations licensed by the FCC.[13] *Second*, whether certain broadcast stations qualify for must carry status on particular cable systems turns upon official review of the content of the programming they offer—*not* whether they have been victims of "anticompetitive conduct." For example, Section 4 allows commercial broadcast stations to demand carriage on cable systems even outside their television market as defined by the FCC if they show, among other things, that they provide "news coverage of issues of concern" or "coverage of sporting and other events of interest to the community." [14]

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[11] *See* Turner Br. 23-27 and *supra* at 2 n.3; Discovery Br. 23-32.

[12] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (emphasizing that the justifications for the sound amplification guideline at issue "ha[d] nothing to do with content") (internal quotation omitted); *Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992).

[13] J.S. App. 51a-53a. *See, e.g.*, CFA Br. 19, 22 n.15, 23 n.18, 28 n.24.

[14] 47 U.S.C. § 534(h)(1)(C). The FCC is to "afford particular attention to the value of localism" in considering such petitions. *Id.* In its *Report and Order* implementing the must carry requirements, the Commission instructed that "[c]overage of news and other programming of interest to the community could be demonstrated by program logs or other descriptions of program offerings." *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2977 (1993). Other parts of Sections 4 and 5 impose express content-based requirements. *See* Turner Br. 23-27.

In fact, numerous petitions have been filed with the FCC seeking to have particular broadcast stations included within or exempted from Section 4's carriage obligations vis-à-vis particular cable systems. A recent decision issued by the Commission, *In re WSBT, Inc., South Bend, Indiana, Memorandum Opinion and Order*, Docket No. CSR-3871-A (rel. Nov. 9, 1993), illustrates the statute's inevitable focus on programming *content*. In granting Station WSBT-TV's request that its must carry rights extend to a number of cable systems beyond the station's official television market, the FCC conducted a review of its "coverage of local events," noting, among other things, the station's "sponsorship of a contest entitled 'I Love to Read' involving six schools" in the communities at issue; the fact that it "has assigned the only full-time reporter to cover these communities from any television licensee either in South Bend or in Chicago"; its coverage of "scores and highlights from the high school teams . . . as part of its daily sports coverage"; as well as its broadcasts regarding "a pep rally, a new Juvenile Center, recycling in La Porte, a profile of the Mayor of the City of La Porte, local lottery winners, stories on the La Porte County Park authority, special election night broadcasts, and a remote news broadcast in 1992 from the La Porte County Fair." [15]

Here, the statute on its face regulates speech based on its content. Indeed, "the very basis for the regulation is the difference in content between" the types of programming Congress requires local broadcast stations to offer and the programming Congress believes operators would otherwise choose to carry.[16]

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[15] *Id.* at 2. NAB's assertion that the statute "*operates* without regard to the content of any expression" (NAB Br. 23, emphasis in original) is simply wrong.

[16] *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993). As noted above and in the next section, the govern-

II. THE "*RED LION* STANDARD" DOES NOT APPLY TO CABLE TELEVISION, NOR WOULD IT JUSTIFY THE ACT'S MUST CARRY PROVISIONS

In an effort not only to sustain Sections 4 and 5 but to obtain a sweeping license to engage in content-oriented regulation of cable television and other emerging media, the government abandons the analysis of the majority below and urges the Court to extend the "*Red Lion* standard" to cable television.[17] The Court should decline the invitation. To conclude that the government may engage in content-oriented regulation of speech or the press whenever it deems it necessary to do so "to correct market failure in a market whose commodity is speech" (Govt. Br. 16-17), or whenever the government action purportedly is aimed at promoting "First Amendment interests"

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ment argues that content-based regulation of cable television should be permitted through an extension of *Red Lion*. The government does briefly assert, however, that the must carry provisions could be considered "content-neutral" because they "are not designed to express disagreement with the message of cable operators or programmers" and do not "single out any topic that cable operators may or may not discuss." Govt. Br. 38. The former simply indicates *viewpoint* neutrality, which, as the government and the majority below acknowledge, is insufficient to avoid exacting scrutiny. Nor is governmental action which promotes or restricts certain *types* of speech (*e.g.*, "local news," "children's programming," or "educational programming") content "neutral" so long as it does not single out particular "topics" of discussion. For example, the commercial publications at issue in *City of Cincinnati* presumably could have discussed a wide variety of "topics," such as the desirability of living in particular neighborhoods, the importance of furthering one's education, or specific information about artistic, musical, or sporting events. Similarly, the charitable solicitation at issue in *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), could involve a virtually unlimited range of "topics" and subject matters. *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n.*, 447 U.S. 530, 537 (1980) (government has no power to regulate expression based upon "its message, its ideas, its subject matter, or its content").

[17] *See* Govt. Br. 13 (the district court reached "the correct result" but applied the wrong standard).

(*see id.* at 14), would be an extremely dangerous step with far-reaching consequences.[18]

A. The bundle of imprecise and variable factors the government relies upon in urging an extension of the *Red Lion* doctrine bears no resemblance to the physical scarcity of the electromagnetic spectrum, which has been held to differentiate over-the-air broadcasting. The principal factor the government relies upon—that few cable systems presently face direct local competition from another multichannel video programming distributor—is directly attributable to misguided governmental policies, not the laws of physics. As noted in *Quincy*, 768 F.2d at 1450, local cable monopolies more likely are attributable "to governmental action—particularly the municipal franchising process—than to any 'natural' economic phenomenon." In the 1992 Cable Act, Congress has now prohibited local authorities from granting exclusive cable franchises and from unreasonably refusing to grant competitive ones.[19]

B. In asking the Court to uphold the must carry provisions under the rubric of *Red Lion*, the government claims the must carry requirements "were specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as 'paramount'." Govt. Br. 2. But the must carry requirements mandate carriage utterly without regard to viewer inter-

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[18] Indeed, the premise of the government's argument—that the market for video programming is in such "dysfunction" as to justify abandoning traditional First Amendment principles—is especially alarming here, in view of the congressional finding that "[p]rogramming choices have . . . grown about 50 percent" since 1984 (S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991)) in the *absence* of must carry requirements. *See* Turner Br. 9-10.

[19] 1992 Cable Act § 7(a), 47 U.S.C. § 541(a). The government acknowledges that restrictive franchising practices have been a primary cause of local cable monopolies. *See* Govt. Br. 9, 27 (prior to the Act "most local authorities made exclusive franchises available to cable operators"); *id.* at 13 (few cable operators face head-to-head competition due to "exclusive franchise arrangements previously sanctioned by local governments").

ests and preferences. *Every* local broadcast station must be carried until the must carry quotas are filled, even if the result is to displace programming viewers would prefer to receive. Turner Br. 15-17. As President Bush noted in vetoing the legislation, the statute "requires cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations."[20]

In *Quincy*, the D.C. Circuit held that one of the fundamental flaws of earlier must carry rules was that they "prevent[ed] cable programmers from reaching their intended audiences even if that result directly contravenes the preference of cable subscribers." 768 F.2d at 1453. In subsequently adopting revised, temporary must carry rules, the FCC at least attempted to address this concern by establishing a viewership standard that broadcast stations had to meet to qualify for mandatory carriage, though that was not enough to uphold their constitutionality.[21] Inexplicably, this third time around, Congress has chosen to enact a must carry scheme which again completely ignores viewer interests, and which, like the rules struck down in *Quincy*, "thwarts viewer preferences" (*Quincy*, 768 F.2d at 1461). *See* Turner Br. 17 & n.38. As *Quincy* noted, this "disregard of subscribers' viewing preferences

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[20] *See* 138 Cong. Rec. H1477 (daily ed. Oct. 5, 1992). The government's heavy reliance on *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and its progeny in arguing that due to "the similarity and interrelatedness of cable and broadcast television, a comparable regulatory approach is appropriate for each" is misplaced. *See* Govt. Br. 27, 33. *Southwestern Cable* did not involve a First Amendment claim, nor did it involve any issue regarding the selection of broadcast versus non-broadcast programming. Indeed, at the time of the Court's early decisions regarding cable television, no cable program networks even existed. As the FCC subsequently recognized, the relationship between cable and broadcast television has changed dramatically with the emergence of cable as an independent provider of diverse video programming in its own right. *See* Turner Br. 5-7; Discovery Br. 4-5.

[21] *Century Communications Corp. v. FCC*, 835 F.2d 292, 297 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

is difficult, if not impossible, to reconcile with the Supreme Court's repeated admonition that the interests of viewers should be considered 'paramount' in the First Amendment calculus." 768 F.2d at 1453 (citing *Red Lion*).[22]

III. THE MUST CARRY PROVISIONS IMPERMISSIBLY BURDEN THE SPEECH OF CERTAIN SPEAKERS IN ORDER TO PROMOTE THE SPEECH OF OTHER, GOVERNMENTALLY-FAVORED SPEAKERS

As the district court below recognized, the must carry provisions inflict distinct constitutional injuries on cable *operators* and cable *programmers*, giving rise to related, but distinct, constitutional claims. J.S. App. 13a-14a & n.18. *See Quincy*, 768 F.2d at 1451-52.[23] As the FCC explained in concluding that must carry rules should be discontinued, must carry "protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers."[24] For Sections 4 and

[22] The *Turner* appellants join the additional arguments set forth in the reply briefs of Time Warner and NCTA demonstrating that no basis exists for extending *Red Lion* to cable television.

[23] Appellees mischaracterize *Quincy* by suggesting that the court's decision was based solely on the "lack of administrative record support" demonstrating a substantial threat to local broadcasting. *See* Govt. Br. 4, 25 n.17. To the contrary, *Quincy* carefully articulated fundamental First Amendment concerns regarding the purposes and effect of the must carry rules at issue—particularly the fact that they sought to promote a governmentally-favored class of speakers by limiting other speakers' access to their intended audiences—and, though finding it unnecessary to reach the issue, strongly indicated that exacting First Amendment scrutiny should apply to such provisions. 768 F.2d at 1451-54. The Court concluded that even *assuming* the government may burden the First Amendment rights of cable speakers as a means to promote "local broadcasting," the government simply failed to show that any genuine threat to "local broadcasting" existed. *Id.* at 1454.

[24] *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864, 880 (1986) (expressly recognizing

5 to be found constitutional, *both* the cable operators' and cable programmers' claims would have to be rejected.

None of the appellees cares to discuss, much less justify, the inconvenient fact that the must carry requirements result in cable subscribers losing all access to cable program networks such as C-SPAN, The Learning Channel, and Court TV, as cable systems are forced to make room for additional broadcast stations.[25] The government's brief makes no attempt to address the First Amendment claims and injuries of the cable *programmers* other than to assert that the burden on programmers is "minor" because the must carry requirements apply to "fewer than half" of the channels available for cable programming. Govt. Br. 15; *see id.* at 19 (referring to "the minor infringement on First Amendment interests in this case"); *id.* at 45 ("the limitation at issue merely restricts, to a limited extent, the channels aavilable to . . . cable networks, such as The Cartoon Network and The Sci-Fi Channel"). And, while the government describes the Court's decision in *Buckley*

"the impact on cable operators' and cable programmers' First Amendment rights" of must carry rules). In connection with the *Quincy* proceedings, the Commission stated that its earlier must carry rules were "intended to compel carriage of broadcast signals in place of alternate programming that subscribers, given a choice, might otherwise choose," and acknowledged that the rules "tak[e] cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use." *See Quincy*, 768 F.2d at 1446.

[25] Turner Br. 15-17; Discovery Br. 2-4, 25; Court TV Br. 7-11. The government's argument that the programmers' position indicates that "in the absence of must-carry rules cable operators would drop numerous broadcast stations" such that "[i]f the programmers are right, then broadcast stations would be in serious jeopardy" (Govt. Br. 29) is unfounded. All parties agree that *most* broadcast stations are carried in the absence of must carry rules, and the results of the FCC carriage survey the government cites (*id.*) are undisputed. *See* J.S. App. 63a-64a. Nonetheless, cable program networks are injured when cable operators who already carry a large number of broadcast stations are forced to carry still *additional* broadcasters pursuant to the must carry requirements.

v. Valeo, 424 U.S. 1, 48-49 (1976), as standing for the principle that "the right of some to speak may not be secured by suppresing [sic] the rights of others," its attempt to distinguish *Buckley* is unavailing.

The government asserts, in essence, that because the Court in *Buckley* made reference to and distinguished the "fairness doctrine" upheld in *Red Lion* on the basis of broadcast principles, and because the government now argues that *Red Lion* should apply to cable television, the must carry requirements are consistent with *Buckley*.[26] This argument fails for the reasons set forth in Point II above: The "*Red Lion* standard" does not apply to cable television and, furthermore, provides no answer to the programmers' distinct claim that the First Amendment condemns the creation of a governmentally-imposed hierarchy of speakers. Turner Br. 28-30. The government's additional argument that the provisions at issue in *Buckley* limited speech "at the core of the First Amendment" while the must carry provisions merely restrict channels available to cable networks "such as The Cartoon Network and The Sci-Fi Channel" (Govt. Br. 15, 45) is baseless. The programming cable networks offer is indisputably fully-protected speech, and includes a wide range of political and public affairs programs unquestionably "at the core of the First Amendment."[27]

To the extent the broadcasters address the programmers' claims, they assert that the programmers' arguments

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[26] Govt. Br. 45. The Public Broadcasters make a similar argument. PBS Br. 40 n.37 (asserting that the *Buckley* principle applies only in "traditional free speech case[s]"). The Public Broadcasters' reliance on *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 799-800 (1978) (PBS Br. 39) also presumes that the reduced level of constitutional scrutiny applicable in the broadcasting context applies to cable television.

[27] *See* Turner Br. 9-12 (noting a variety of news, commentary, and informational programming offered by cable networks). C-SPAN's programming every day lies "at the core" of the First Amendment. CNN's carriage of the debate between Ross Perot and Vice President Gore concerning NAFTA is another recent example.

consist of nothing more than a complaint that broadcasters have been treated more favorably. *See* PBS Br. 39-40; NAB Br. 32-33. This simply misrepresents the programmers' position, as even the district court recognized.[28] As Judge Williams stated, "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." J.S. App. 55a. NAB's reliance on the portion of *Buckley* upholding provisions "that discriminated between major and minor parties in public election financing" (NAB Br. 38) merely proves the programmers' point. With respect to those provisions, the Court in *Buckley* emphasized that "appellants have made no showing that the election funding plan disadvantages nonmajor parties by operating to *reduce* their strength below that attained without any public financing." 424 U.S. at 98-99 (emphasis supplied).[29]

While certain of the broadcasters rely upon *Leathers v. Medlock, supra,* in asserting that the programmers have no First Amendment claim, neither the court below nor the government on appeal has embraced this contention. A generally-applicable sales tax like that at issue in *Leathers* does not regulate *speech*, enjoin editorial decisions, or block a speaker's access to an audience. Although satel-

[28] The majority below explained: "The programmers do not merely contend that Congress has failed to provide a benefit to programmers that is has provided to others. Instead, the programmers contend that Congress has, by increasing broadcaster speech in a limited forum, *reduced* the speech of the programmers. This is a First Amendment claim." J.S. App. 14a n.18 (emphasis in original). *See* Turner Br. 27-28.

[29] If the appellees' views were correct, then the D.C. Circuit's applications of the principle set forth in *Buckley*—that government may not promote the speech of some by burdening the speech of others—to strike down broadcaster-protectionist regulation on three occasions were all in error, three rulings that this Court declined to review. *Century, supra; Quincy, supra; Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

lite broadcast services were exempted from the tax at issue in *Leathers* while cable television sales were not, this "discrimination among speakers" (NAB Br. 32) did not promote the speech of one group by imposing special burdens on the speech of another group; the financial benefit to one class resulted in no corresponding "loss"—of anything—to others. That certain groups or elements of the press may benefit financially as a result of being exempted from a general tax or regulatory burden cannot be said to *interfere* with the constitutionally-protected activities of other speakers.[30] *See also* Discovery Br. 25-26 n.9.

IV. THE MUST CARRY PROVISIONS CANNOT BE SUSTAINED AS A REMEDY FOR ALLEGED "ANTICOMPETITIVE" BEHAVIOR

Both the government and the broadcasters strive to concoct rationales, albeit different ones, for shielding the must carry requirements from meaningful judicial review; indeed, both urge the Court to adopt a standard of review even *less* demanding than that applicable to "time, place, and manner" regulations[31] or general regulations of conduct.[32] Both, though especially the broadcasters, appear to take the view that even legislation that specifically, purposefully, and directly regulates speech—and nothing but speech—is somehow immune from First Amendment scrutiny if its purposes may be characterized as "economic."

[30] *Accord Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983) (concluding that "Congress is not required by the First Amendment to *subsidize* lobbying . . . . In these cases, Congress has not infringed any First Amendment rights or regulated any First Amendment . . . activity.") (emphasis supplied). *See also id.* at 549-50 ("'although government *may not place obstacles in the path of a* [*person's*] *exercise of freedom of speech*, it need not remove those not of its own creation.'") (emphasis supplied, citation omitted).

[31] *See Ward*, 491 U.S. at 791.

[32] *United States v. O'Brien*, 391 U.S. 367 (1968).

This is not the law, as this Court squarely held in *Riley*, 487 U.S. at 788-90 & n.5.[33]

We repeat: Sections 4 and 5 are content-based, speaker-specific, direct regulations of speech which properly merit "strict" or "exacting" First Amendment scrutiny, notwithstanding the purported "economic" justifications offered for the statute. Yet even under "intermediate" scrutiny, the government's burden of justification "is not satisfied by mere speculation or conjecture,"[34] and the government "must affirmatively establish" that a regulation burdening speech targets "no more than the exact source of the 'evil' it seeks to remedy."[35] Appellees' claims that the must carry provisions represent a "narrowly-tailored" means of redressing the "evil" of "anticompetitive conduct" by cable operators against local broadcasters are unsustainable under any First Amendment standard of review.

A. As indicated above, the central "economic" justification offered for the must carry requirements is that cable operators systematically deny carriage to local broadcasters in order to eliminate broadcasters' competition for local advertising revenues and to make room for cable program networks that permit cable operators to offer some advertising adjacent to their programming.[36] Therefore, the

[33] *See* Turner Br. 31-34. *See also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (the Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment").

[34] *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) (government "must demonstrate that the harms it recites are real"). *See also City of Cincinnati*, 113 S. Ct. at 1510 & n.12 ("we require the governmental goal to be substantial, and the cost to be carefully calculated") (quoting *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

[35] *Fox*, 492 U.S. at 480; *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

[36] *See* 1992 Cable Act § 2(a)(15). Most of the advertising seen on cable program networks is advertising of the cable networks themselves, not the local cable operator. Cable networks do, however, often negotiate to allow the operator to offer some local advertising adjacent to cable network programming. At the behest of broadcast interests, Congress has adopted provisions (as reflected in the must carry provisions themselves—*see* 47 U.S.C. § 534(b)(3)) which require cable operators to carry broadcast signals in their "entirety," including all broadcast advertising. *See* 17 U.S.C. § 111. To the extent legal obstacles prevent broadcasters from negotiating with cable operators to allow limited advertising inserts as cable networks do, there is no reason why such obstacles could not be removed.

argument goes, decisions by cable operators to carry cable program networks in lieu of local broadcasters are merely "anticompetitive conduct." Yet it is undisputed that cable operators carry *most* local broadcast stations in the absence of must carry requirements, including their *strongest* competitors for local advertising revenues, such as national broadcast network affiliates. *See* Turner Br. 42-46; J.S. App. 63a-66a. In addition, there are over 120 national and regional cable program networks operators can choose from; nonetheless, cable operators voluntarily choose to carry a host of local broadcast stations in lieu of available cable program networks despite the purported economic "incentive" not to.[37] In fact, because the overwhelming source of operator income is derived from *subscriber revenues*, not advertising (*see* Turner Br. 44), "[y]ou don't need a Ph.D. in Economics to figure out" (Govt. Br. 5) that an operator's overwhelming economic "incentive" is to attract and retain subscribers by offering an appealing mix of programming, including whatever broadcast programming subscribers wish to receive.[38]

[37] *See* PBS Br. 36 n.33. Moreover, some of the most widely-carried cable programming services—such as Turner's TBS—do not allow local advertising inserts at all.

[38] *See* INTV Br. 19 ("Generally, a cable system has a financial incentive to carry the network-affiliated stations because that carriage maintains or increases the cable system's subscriber base."); J.S. App. 65a-66a (citing evidence, *inter alia*, that broadcast television continues to account for 92 percent of all television advertising revenues). And, as Judge Williams also noted, "[t]aken at its best," the theory that cable operators deny carriage to local broadcast stations to weaken their ability to compete for advertising

B. That Congress believed, accurately, not only that cable operators would voluntarily carry local broadcast programming which cable subscribers wish to receive, but would *pay* to do so, is evidenced by Section 6 of the Act—the retransmission consent provision. *See* Turner Br. 14, 49. As appellees CFA, *et al.*, explain, "[r]ecognizing that it is not necessary to force cable operators to carry many of these stations, Congress created the retransmission consent alternative," pursuant to which broadcast stations can *withhold* their signals from cable operators if dissatisfied with the compensation offered by the operator.[39] Indeed, "[t]he vast majority of commercial stations appear to have opted for retransmission consent rather than must-carry."[40] Thus, as appellees acknowledge, it is generally the least-viewed, least-popular broadcast stations that will find it necessary to force themselves onto cable systems pursuant to the must carry provisions. Appellees' position appears to be *not* that this "market for speech" is "dysfunctional,"

"lend[s] *no* support to § 5 of the Act . . . as the educational stations do not advertise." *Id.* at 65a (emphasis in original).

[39] *See* CFA Br. 31-33 (noting that "more popular" TV stations will "choose to forego mandatory carriage"); *see also* INTV Br. 19-20 (stations that help an operator "maintain[] or increase[] the cable system's subscriber base" will tend to opt for retransmission consent instead of must carry, but other stations "do not have that luxury").

[40] CFA Br. 33 & n.31-32; Discovery Br. 43-44 & n.18. Moreover, as Congress also anticipated, powerful commercial broadcasters have leveraged their retransmission consent rights to demand carriage of broadcaster-affiliated cable program networks—so-called "ransom channels" (*see* Turner Br. 14-15 n.31)—in consideration for carriage of their broadcast signals, resulting in additional cable channel slots being allocated to the wealthiest broadcasters. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 35-36 (1991) (noting that broadcasters opting for retransmission consent may negotiate for "an additional channel on a cable system"). The fact that a particular station opts for must carry rather than retransmission consent does not mean, however, that operators would necessarily refuse to carry such stations voluntarily. *See id.* at 35 ("many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal").

but rather that market forces are functioning *too* effectively.[41]

C. In view of the foregoing,[42] decisions by operators not to carry particular local broadcast stations cannot be simplistically or uniformly characterized in advance as "anticompetitive conduct," and the sweeping prophylactic measures Congress has adopted are vastly overbroad. Turner Br. 42-46. INTV disingenuously suggests in connection with its "antitrust" discussion that the must carry provisions "provide for case-by-case determinations that appellants demand" (*see* INTV Br. 26, citing 47 U.S.C. §§ 534(d) and 534(h)(1)(C)), while failing to point out that it is *not* a defense under the statutory provisions for a cable operator to show that a challenged carriage decision is based upon legitimate editorial considerations rather than alleged "anticompetitive" factors.[43]

D. The must carry provisions bear no resemblance to "per se" rules of antitrust enforcement. A cable operator's very *raison d'etre* is to choose from among the enormous

[41] *See* CFA Br. 25 (asserting that "First Amendment interests" should not be left "to the whims of the economic marketplace"). Contrary to CFA's related assertion, broadcasters are by no means unique as providers of "cultural programming and certain other programming which appeals only to smaller segments of the audience." *Id.* at 27. Many cable program networks, including A&E, BET, Lifetime, and numerous others, provide a wealth of programming aimed at minorities and women, foreign language programming, quality programming for children, performing arts programming, closed-caption programming for the hearing-impaired, and a variety of other specialized programming not aimed at "mass" audiences.

[42] We have already addressed appellees' assertions that "vertical integration" in the cable industry justifies the must carry requirements. Turner Br. 35-36.

[43] 47 U.S.C. § 534(d) simply provides a mechanism for a commercial broadcast station that qualifies for carriage under Section 4 to obtain an enforcement order. To the extent case-specific determinations are provided for under 47 U.S.C. § 534(h)(1)(C), the Commission is, as noted *supra* at 6 n.14, instructed to focus on "the value of localism"—not whether a broadcast station has been the victim of "anticompetitive" conduct.

variety of sources of video programming available in order to put together a package of programming that will be appealing to television viewers.[44] Unlike, for example, horizontal price fixing, which is so certain to be aimed at destroying competition as to warrant condemnation without inquiry into actual anticompetitive purposes or effects, there is nothing inherently suspicious about a cable operator choosing between competing sources of programming: To the contrary, as Judge Williams points out, that is what they do for a living. J.S. App. 58a.

CONCLUSION

The decision of the three-judge district court should be reversed.

Respectfully submitted.

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Dated: December 21, 1993

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[44] It is undisputed that the supply of video programming alternatives available to cable operators vastly exceeds the capacity of virtually all cable systems and, consequently, editorial choices have to be made. Turner Br. 4-5. Decisions to carry certain programmers necessarily requires excluding others. Indeed, as indicated above, the essence of the cable programmers' First Amendment claims is that particular programmers have no right to enlist the injunctive power of the government to secure access to cable audiences at the expense of other programmers.